

**United States Department of Labor
Employees' Compensation Appeals Board**

BRENDA J. BROWN, Appellant

and

**U.S. POSTAL SERVICE, CENTER POINT
POST OFFICE, Birmingham, AL, Employer**

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**Docket No. 04-1143
Issued: September 7, 2004**

Appearances:
Brenda J. Brown, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 23, 2004 appellant filed an appeal of a January 6, 2004 decision of the Office of Workers' Compensation Programs which denied her request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed from the most recent merit decision dated September 13, 2002, to the filing of this appeal on March 23, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On April 23, 2002 appellant, then a 49-year-old rehabilitation distribution clerk, filed an occupational disease claim alleging that she suffered job-related stress and depression.

Appellant stated that she suffered constant pain from an employment injury and that other job duties caused her stress. She stopped work on January 9, 2002. In an attached statement appellant documented her work history and alleged that her stress was caused by badgering by her supervisors regarding the restrictions from two prior shoulder injuries which culminated in a confrontation on January 9, 2002 regarding her use of sick leave, after which she was asked to leave the employing establishment. She also submitted medical evidence dating from December 15, 1987 to April 18, 2002, including January 29, 2002 reports in which Dr. Cesar E. Munoz, Board-certified in psychiatry, diagnosed depression secondary to chronic pain and worsened by job pressure.¹

The employing establishment controverted the claim and submitted a statement dated May 22, 2002 in which Robert Beard, appellant's supervisor, countered her contentions and described the meeting of January 9, 2002 between appellant, C.M. Hooten, his supervisor and himself.

By letter dated June 10, 2002, the Office advised appellant that the evidence submitted was insufficient to establish her claim and informed her that she should submit a statement regarding the specific employment conditions or incidents which she felt contributed to her condition as well as a comprehensive medical report showing a diagnosis of any condition resulting from her federal work activities and a physician's opinion, with medical reasons for such opinion, as to how the work exposure contributed to the diagnosed condition. She was given approximately 30 days to respond. In a second letter dated that day, the Office requested that the employing establishment provide information regarding appellant's job duties and the allegations made in her claim.

In a response dated June 19, 2002, appellant reiterated her prior contentions. By letter dated August 1, 2002, the employing establishment described appellant's work history and responded to her contentions. The employing establishment also forwarded a January 9, 2002 report in which Mr. Hooten described the events of that day, including his meeting with appellant and Mr. Beard.

In a disability slip dated August 6, 2002, Dr. Munoz advised that appellant needed an indefinite absence due to stress and depression.

By decision dated September 13, 2002, the Office denied the claim, finding that appellant failed to establish any compensable factors of employment and therefore failed to establish that she sustained an emotional condition in the performance of duty.

¹ The additional medical evidence included a work capacity certificate with an illegible signature dated December 15, 1987, a report dated January 11, 1988 from Dr. Donald H. Slappey, Board-certified in orthopedic surgery, describing knee and shoulder conditions, an April 19, 1991 report in which Dr. Charles Morgan diagnosed left shoulder bursitis and an April 18, 2002 report in which Warren T. Jackson, Ph.D. described his evaluation and testing of appellant.

In a letter dated September 12, 2003 and sent to the district Office where it was stamped received on September 15, 2003, appellant requested reconsideration and an oral hearing.² She additionally submitted a handwritten statement and a May 7, 2002 statement in which Carlos J. McCurdy, a coworker, advised that on January 9, 2002 after a meeting in Mr. Beard's office appellant was upset. He stated that he overheard comments made by Mr. Beard and Mr. Hooten in which appellant was ordered to leave the employing establishment.

By letter dated November 2, 2003, appellant forwarded additional medical evidence including treatment notes dated December 19, 2002 and January 22 and February 19, 2003 in which Dr. John D. Morgan, Board-certified in internal medicine and rheumatology, noted his treatment of appellant for chronic pain and diagnoses of hypertension, depression and stress. In a report dated February 27, 2003, Dr. John D. Morgan advised that appellant had chronic pain syndrome and post-traumatic arthritis caused in part by employment activities. He further stated that her "rocky relationships at work" and disagreements with her supervisors contributed to her condition. Appellant also submitted clinic notes dated March 4 and 18 and April 8, 2003 in which Dr. Michael Scott Kendrick, Board-certified in anesthesiology, diagnosed myofascial pain syndrome, probable fibromyalgia, lumbago and cervicgia and reported his treatment with medication. In a computer-generated note dated May 20, 2003, Dr. Munoz diagnosed depression and personality disorder.

The record contains a memorandum of telephone call dated December 20, 2003 in which the Office noted that it had no record that appellant had requested reconsideration. Appellant thereafter resubmitted her September 12, 2003 request which was stamped received by the Office on January 2, 2004. In a letter dated January 8, 2004, the Office informed the employing establishment that the evidence of record warranted merit review and requested comments.

By decision also dated January 8, 2004, the Office denied appellant's reconsideration request on the grounds that it had not been filed within one year of the September 13, 2002 merit decision and did not show clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.³ The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁴ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁵

² Appellant also submitted duplicates of evidence previously of record.

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

⁵ *Cresenciano Martinez*, 51 ECAB 322 (2000).

With respect to whether a request for reconsideration is timely filed, section 10.607(a) of the Office regulation provides:

“An application for reconsideration must be sent within one year of the date of the [Office] decision for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date.”⁶

ANALYSIS

The only decision before the Board is the January 8, 2004 decision in which the Office denied appellant’s request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error. The Board, however, finds that the record contains a timely request for reconsideration.

In the present case, the record contains a reconsideration request dated September 12, 2003 and stamped received by the Office on September 15, 2003. The envelope in which appellant mailed her request for reconsideration dated September 12, 2003 is, however, not in the record. Therefore, the postmark date of the mailing cannot be determined. Absent the postmark date, other evidence may be used to establish the mailing date and therefore the timeliness of the reconsideration request.⁷ As appellant’s request for reconsideration is dated September 12, 2003 and was date-stamped received by the Office on September 15, 2003 it is reasonable to assume and the Board so finds, that the request was timely filed within one year of the Office’s September 13, 2002 decision. The Office’s denial of appellant’s reconsideration request as untimely was therefore in error.

To require the Office to reopen a case for reconsideration, Office regulation provide that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and setting forth arguments and presenting evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁸ Section 10.608(a) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.⁹

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* See *Algimantas Bumelis*, 48 ECAB 679 (1997) (the timeliness of a reconsideration request is determined by the postmark on the envelope, but if the envelope is not available, the date of the letter itself may be used); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (April 2002).

⁸ 20 C.F.R. § 10.606(b)(2).

⁹ 20 C.F.R. § 10.608(a).

In support of her September 12, 2003 request for reconsideration, appellant submitted a statement from a coworker, Mr. McCurdy, describing the events of January 1, 2002. She subsequently submitted medical evidence including a February 27, 2003 report in which Dr. John D. Morgan advised that employment factors contributed to appellant's condition. Because the Office erroneously applied the clear evidence of error standard, it did not analyze the evidence appellant submitted pursuant to section 10.606(b).¹⁰ The case must therefore be remanded for the Office to review the evidence that appellant submitted and make the proper analysis pursuant to section 10.606(b). The Office shall then issue an appropriate decision.

CONCLUSION

The Board finds that appellant's request for reconsideration dated September 12, 2003 was timely filed and thus the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 23, 2004 is reversed regarding the untimely filing of the reconsideration request and remanded for further consideration consistent with this opinion of the Board.

Issued: September 7, 2004
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ See *Joyce A. Fasanello*, 49 ECAB 490 (1998).